

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

76-7469

To be argued by
ROBERT P. SHAUGHNESSY

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United States Court of Appeals
FOR THE SECOND CIRCUIT

PRATT & WHITNEY, DIVISION OF
UNITED AIRCRAFT CORPORATION,

Plaintiff-Appellant,

—against—

BURLINGTON NORTHERN, INC.,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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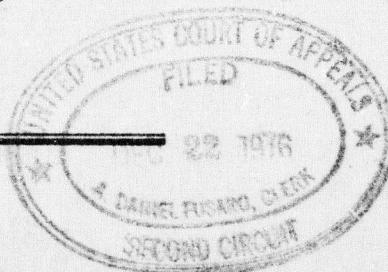


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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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PRATT & WHITNEY AIRCRAFT, division of
UNITED AIRCRAFT CORPORATION

Plaintiff-Appellant

-against-

BURLINGTON NORTHERN, INC.

Defendant-Appellee

- - - - - X

On Appeal from the U.S. District Court
for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

Plaintiff has appealed from a judgment of the United States District Court for the Southern District of New York (Owen, J.), which: 1) denied plaintiff's motion for summary judgment; 2) granted defendant's cross-motion for summary judgment; and 3) dismissed plaintiff's action as time-barred. (43).

QUESTION PRESENTED

Whether District Judge Owen's finding (42) that the letter of Penn Central Company to the Aetna Casualty & Surety Company of January 20, 1970 (29) constituted an unequivocal disallowance of plaintiff-appellant's claim and thus started the running of the statute of limitations under the uniform bill of lading was reasonable.

FACTS

This suit is concerned with a shipment of electric generators and parts which was made on August 7, 1968, by Electric Machinery Manufacturing Company from Minneapolis, Minnesota, and consigned to Western Massachusetts Electric Company in West Springfield, Massachusetts (26).

On August 23, 1968, a claim for such damage was filed by plaintiff-appellant Pratt & Whitney Aircraft, division of United Aircraft Corporation, with Penn Central Railroad Company, the delivering carrier (27). This written claim for damage to the shipment is a form claim letter which plaintiff-appellant had designed for use in filing claims with blank spaces provided for the insertion of information for the particular claim.

Ten months later, on July 2, 1969, a letter was addressed to Penn Central by the Aetna Casualty & Surety Company, the

subrogated insurer, furnishing additional information and documents, requesting investigation by that carrier and in due course the forwarding of a settlement draft to it for the amount of the claim, \$34,134.50 (28).

Six months later, on January 20, 1970, the Penn Central addressed a letter to Aetna Casualty (29), disallowing the claim. The body of the letter is as follows:

"Referring to the above numbered claim originally filed by your insured, the Pratt & Whitney Aircraft Corp., Hartford, Conn., in the amount of \$34,134.50.

"Aside from discovery of the fire, our investigation does not indicate any irregularities in the handling of this consignment. Examination of car established that brakes and journals had functioned properly, a factor which might otherwise have related the incident to carrier negligence. After extensive investigation by our Security Department, the cause of fire remains unknown.

"Considering the natural hazard of exposure to the elements and the absence of carrier negligence, I regret that I am not at liberty to volunteer responsibility for damages claimed. Under the circumstances, it is my unpleasant duty to advise that claim is respectfully disallowed."

On January 30, 1970, Aetna Casualty sent a letter to Penn Central (30), in reply to the written disallowance. The body of Aetna Casualty's letter is as follows:

"We cannot accept the denial of liability contained in your letter of January 20, 1970.

"In fact, it is difficult to understand how you can take such a position in view of the fact the shipment was destroyed by fire while in the care, custody and control of the Penn Central Company. Surely you must realize the absence of negligence is no defense to a common carrier. Such a carrier is an insurer of goods not only by reason of Federal Statutes, but also under the Common Law.

"We trust you will reconsider your untenable position and forward to us your draft in the amount of \$34,134.40. Claim has now been pending for seven months and we would appreciate a prompt settlement."

Subsequent to Aetna Casualty's letter of January 30, 1970, and within the two year and one day limitation period which commenced with the written disallowance of the claim on January 20, 1970, and expired on January 22, 1972, there were exchanges of correspondence between Aetna Casualty and Penn Central. Penn Central in its letter of June 11, 1970 (31), stated the claim was under investigation and that it was tracing for additional information before it could conclude its handling. In its letter of December 22, 1970 (32), Penn Central stated the claim was with its legal department, that it was tracing for its immediate return and would contact Aetna Casualty further.

Penn Central's Statement of Claim Account to Aetna Casualty & Surety dated May 25, 1971, which showed open or outstanding claims by Aetna Casualty with Penn Central did not include a listing of the subject claim (33). On June 4, 1971, Aetna Casualty wrote Penn Central (34), requesting payment of the

claim and pointing out that the subject claim was not shown as outstanding in the Statement of Claim Account. On June 14, 1971, Penn Central wrote to Aetna Casualty (35), advising that the claim was withdrawn from open account in error and that the file was with its legal department. Since the letter of disallowance from Penn Central to Aetna Casualty had been on January 20, 1970, the two year and one day statute of limitations would not have operated until January 22, 1972, and, therefore, this exchange between Penn Central and Aetna Casualty was well within the statutory limitation period. On March 12, 1973, Aetna Casualty, by its attorneys, referred the claim to defendant-appellee Burlington Northern Inc. (39). By letter dated July 10, 1973, Burlington Northern pointed out to the attorneys for Aetna Casualty that the statute of limitations had operated after two years and one day from the written disallowance of the claim on January 20, 1970 (41).

This action was not commenced until May 1, 1974 which date is over four years subsequent to written disallowance of the claim on January 20, 1970.

APPLICABLE STATUTE

Section 20(11) of the Interstate Commerce Act, 49 U.S.C.A. § 20(11) provides in material part as follows:

" . . . That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice . . ."

The provisions of the uniform domestic straight bill of lading under which the instant shipment moved is approved and authorized by the Interstate Commerce Commission, 14 I.C.C. 346, 52 I.C.C. 671 and 64 I.C.C. 357.

Section 2(b) of the uniform bill of lading provides as follows:

"(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid." (Emphasis supplied).

POINT I

THE SHIPMENT INVOLVED WAS INTERSTATE
AND AS SUCH WAS GOVERNED BY THE PROVI-
SIONS OF THE INTERSTATE COMMERCE ACT

The carload shipment involved in this suit admittedly moved in interstate commerce and as such, was subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 1 et seq., and in particular to Section 20(11) of that Act, commonly known as the Carmack Amendment. The applicable portions of Section 20(11) authorizing the setting of a nine month period from the time of shipment for written claim to be presented and a two year and one day period for the institution of suit following written disallowance of the claim by the carrier have been previously set forth.

Section 20(11) in addition to these provisions makes either the initial or delivering carrier of a through shipment liable to the shipper or owner of interstate freight for loss, damage or injury caused by it, or any connecting carrier. The effect of these latter provisions was to remove from the realm of State law to that of Federal law the whole field of law involving loss and damage to interstate shipments. Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

The relationship between the carrier and the parties to the shipment is therefore to be determined by the Interstate

Commerce Act and the decisions, both Federal and State construing the same. Southern Ry. v. Prescott, 240 U.S. 632, 637 (1916); Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209, 211 (1931); Ga. Fla. & Ala. Ry. v. Blish Co., 241 U.S. 190, 197 (1916); Cleveland & St. L. Ry. v. Dettleback, 239 U.S. 588, 594 (1916); Davis v. Henderson, 266 U.S. 92 (1924); Mo. P. R. Co. v. Elmore & Stahl, 377 U.S. 134 (1964); Sylgab Steel & Wire Corp. v. Strickland Trans. Co. 270 F. Supp. 264, 268 (EDNY 1967). In Chesapeake & Ohio Ry. v. Martin, supra, the court stated at p. 213 that:

" . . . Since it (bill of lading) was issued in respect of an interstate shipment pursuant to an act of Congress, the bill of lading is an instrumentality of such commerce, and the question whether its provisions have been complied with is a federal question to be determined by the application of federal law." (Authorities cited)

POINT II

PLAINTIFF'S FAILURE TO INSTITUTE SUIT
WITHIN TWO YEARS AND ONE DAY FROM THE
DATE OF WRITTEN DISALLOWANCE OF ITS
CLAIM IS AN ABSOLUTE BAR TO THE PROS-
ECUTION OF THIS ACTION

The cases in support of the limitations provision authorized by Section 20(11) of the Interstate Commerce Act and incorporated in Section 2(b) of the Uniform Bill of Lading are many and they hold to the effect that these limitation provisions are absolute and cannot be waived.

In B. A. Waltermar Co. v. Pennsylvania Railroad Co., 295 F.2d 627 (6th Cir. 1961) the Court stated at p. 628 that:

"The carrier may not waive or be estopped to assert the requirements of the bill of lading as this would permit discrimination which is prohibited by law. Georgia, etc., Railway Co. v. Blish Milling Co., 241 U.S. 190, 36 S.Ct. 541, 60 L.Ed 948; Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed 983. Cf. Midstate Horticultural Co. v. Pennsylvania Railroad Co., 320 U.S. 356, 64 S.Ct. 128, 88 L. Ed 96."

Among the many cases setting forth this holding are the following cases:

Burns v. Chicago, M., St.P.& P.R. Co., 192 F.2d 472 (8th Cir. 1951); Holford v. Louisville & N.R. Co., 266 F.Supp. 408 (W.D. Tenn. 1967); Brewster v. Davis, 207 App. Div. 461 (4th Dept. 1924); Germini v. New York Central R. Co., 209 App. Div. 442 (1st Dept. 1924); Lissberger v. Bush Terminal R. Co., 119 Misc. 691 (App. Term 1st Dept.

1922); L.M. Kirkpatrick Co. v. Illinois Central R. Co., 190 Miss. 157, 195 So. 692, 135 A.L.R. 607 (1940). See also Annot. 6 A.L.R. 3d 1197, 1227, 1250 (1966).

In the suit Burns v. Chicago, M., St.P. & P.R. Co., Supra, the plaintiff had instituted an action against the railroad for loss and damage to a shipment of livestock. The defendant railroad had sent a letter to the plaintiff disallowing the plaintiff's claim. Subsequent to the letter of disallowance there were a series of negotiations and correspondence between the parties exploring the possibility of settlement of the claim. However, there was no settlement and the plaintiff commenced the action but beyond the two-year and one-day limitation period. The plaintiff took the position that the limitation period was extended by the subsequent negotiations between the parties. The District Court granted defendant's motion for summary judgment and this was affirmed by the Court of Appeals. The Court of Appeals held that the limitation provision could not be tolled by any subsequent negotiations between the parties and that the precedents were clearly to the contrary.

The appellant argued in the Burns case that the letter of disallowance was not intended as such by the railroad, that a jury question existed as to its true meaning and that the actions of the carrier subsequent to the disallowance constituted a revocation of the disallowance. On

each issue the appellate court held for the carrier. Especially significant is that portion of the opinion considering the letter of disallowance, where at p. 476 the court stated:

"We have considered the argument made for appellants to the effect that the letter was ambiguous and was insufficient to start the running of the limitation period because of the way it was worded but we are in accord with the conclusion of the trial court that the letter declared a disallowance of the claim and started the running of the statutory period for suit. The following cases lend support to the conclusion: Tribby v. Chicago, N.W.R., 64 S.D. 23, 264 N.W. 185; Atlantic Coast Line R. Co. v. Wauchula Truck Growers Ass'n, 95 Fla. 392, 118 So. 52; Barber v. Southern Pacific Company, 51 N.M. 396, 185 P. 2d 979.

* * * *

"Although it is earnestly contended for appellants here that the subsequent negotiations carried on by the railroad and its conduct and offer of settlement (for less than the claim) amounted to a rescinding, revoking or withdrawal of its disallowance of plaintiffs' claim and tolled the running of the limitation period, we think the precedents are clearly to the contrary and the holding of the trial court was without error."

In Holford v. Louisville & Nashville Railroad Co., supra, which involved the failure to institute suit within the requisite period, the carrier sent a letter of disallowance on August 18, 1964 denying the shipper's claim. The shipper protested the disallowance and this resulted in a letter from the carrier dated September 14, 1964 which provided in part as follows (p. 408):

"I now find that there will be some additional investigation needed and request that you hold the matter in abeyance pending completion. I will contact you after the additional information is secured."

Subsequently the railroad adhered to its original position. The shipper contended that the letter of September 14, 1964 amounted to a revocation of the letter of August 18, 1964. After stating that the time provisions of the bill of lading were strictly construed and that waiver and estoppel could not apply, the court granted summary judgment for the carrier. At page 409 of the Court's opinion, it was stated:

"It is the opinion of this Court that the numerous authorities that have considered the time requirements under the Uniform Bill of Lading have strictly construed the applicability and have held that waiver and estoppel cannot toll the time requirements."

The New York case of Brewster v. Davis, supra, involved a situation where the plaintiff had both failed to file a timely notice of claim and to commence suit within the limitation period. The Court in finding for the railroad stated that the plaintiff was presumed to have known the conditions in the bill of lading and that he seemingly ignored them.

Germini v. New York Central R. Co., supra, holds that a suit brought after the two-year and one-day limitation period is barred. At p. 445 of the opinion, the Appellate Division stated:

"The contract limitation is undoubtedly a bar to suit not commenced within its terms."

Lissberger v. Bush Terminal R. Co., 119 Misc. 691 (App. Term 1st Dept. 1922), involved a situation where the plaintiff had failed to make a timely claim and then failed to institute suit within the limitation period. The Court held that the plaintiff's action was barred on both grounds.

That there can be no waiver of the limitation provisions is clear from the applicable cases. One example of this is the case of L. M. Kirkpatrick Co. v. Illinois Central R. Co., 190 Miss. 157, 195 So. 692, 135 A.L.R. 607. There the railroad pleaded as a defense that the suit was not commenced within the two-year and one-day limitation period following written disallowance of the claim by the carrier. However, subsequent to this rejection the railroad had sent the plaintiff a notice agreeing to reconsider the claim. The suit was brought within two years and a day after the giving of this second notice. The plaintiff contended that the two-year and one-day limitation period commenced from the date of the second notice.

The Court in upholding the statute of limitations defense of the carrier held that the carrier was without power to waive any valid provision of the bill of lading contract. The Court stated that the carrier could not by conversations, letters and negotiations extend the time for

suit beyond that limited by the bill of lading and permitted by the Interstate Commerce Act. The Court observed that this position was mandated by the purpose of the Interstate Commerce Act which was to absolutely uproot and destroy all discriminations in interstate commerce, regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished.

A case setting forth the same principles is Shulman v. Superior Trucking Company, Inc., 3 Conn. Cir. 712, 223 A.2d 407 (1966) which involved an action against a carrier for damage to a lathe which was shipped from the State of Georgia to Connecticut. The machine arrived in Connecticut in a damaged condition. No notice in writing was given the defendant; instead, "the plaintiff advised" defendant's agent that the lathe was damaged; and defendant's agent "advised (the) plaintiff to contact the defendant by telephone at its home office." Subsequently, negotiations were begun between an adjustment agency and the plaintiff which culminated in a settlement figure. Finally the defendant and its insurance carrier refused to pay. The demurrer to the complaint was based upon Section 2(b) of the bill of lading which provides, inter alia, that claims must be filed in writing within nine months after delivery of the property. The Court stated at p. 408 of 223 A.2d that the principal question was "whether there has been either a waiver or an estoppel of the

requirement of the notice as specified in the bill of lading." The court in sustaining the demurrer stated at p. 408 that:

"The requirement in 2(b) that the notice of claim shall be 'in writing' has come to be an integral part of the uniform published tariffs and regulations which the carrier may not waive or be estopped to assert. Loveless v. Universal Carloading & Distributing Co., 10 Cir., 225 F.2d 637, 639; see B.A. Waltermar Co. v. Pennsylvania R. Co., 5 Cir. 295 F.2d 627, 628. Nor may the doctrines of waiver or estoppel be applied against the defendant carrier to obviate the requirement of written notice."

That the policy of the Interstate Commerce Act is to provide that equal consideration be given to both carrier and shipper and that neither party can waive or be estopped from asserting its provisions is best exemplified by a decision rendered by the United States Supreme Court. In Midstate Horticultural Co. Inc. v. Pennsylvania Railroad Co., 320 U.S. 356 (1943) there was an express agreement by the shipper not to plead the statute of limitations in an action by the carrier to recover the full amount of transportation charges. By its terms, in consideration of the carrier's forbearance to sue for a specified time, the shipper undertook not to "plead in any such suit the defense of any general or special statute of limitations." Two months later but

within the extended time, the shipper finally declined to pay and the carrier commenced suit. The Court held the agreement to be invalid. The following quotations from the Court's opinion, pages 361 and 367 respectively, illustrate the Court's reasoning:

"Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest in adequate, non-discriminatory transportation at reasonable rates. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This 'obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.' Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97.

* * * *

"We are not unmindful of the hardship to respondent in the special circumstances, though petitioner asserts it would suffer equal hardship if the decision were the other way. Nor do we ignore the strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest, might move against denying effect to such an agreement. But this case boils down to an old adage about sauce and geese, which need not be given citation."

One of the cases upon which plaintiff-appellant relies is John Morrell & Co. v. Chicago, Rock Island and Pacific Railroad Company, 495 F.2d 331 (7th Cir. 1974).

In that case, the Court of Appeals for the Seventh Circuit by a divided vote affirmed the action of the trial court in holding that the disallowance given by the railroad was not an unequivocal disallowance and for this reason the statute of limitations had not commenced to operate. The case is distinguishable from the situation in the present suit. However, it should be observed that the tenor of the majority opinion and parts of it are inconsistent in some respects with the line of authorities previously set forth.

In the Morrell case, the carrier advised the claimant in writing on February 19, 1968 that the cause of the loss was inadequate refrigeration resulting from improper loading by the shipper and that in the circumstances the carrier had no option but to disallow the claim. There was subsequent correspondence. On December 6, 1968, the carrier conceded that there might be some carrier liability and offered a settlement in the amount of \$5,649.12. On September 26, 1969, after an oral offer of settlement of \$7,000.00 was rejected by the claimant, the carrier reaffirmed its previous offer of \$5,649.12

and disallowed the remainder of the claim. There were further negotiations. Suit was not instituted until September 13, 1971 which was more than two years and one day after the disallowance on February 19, 1968.

The Court of Appeals in the majority opinion stated that the trial court agreed with the defendant railroad's authorities that once a disallowance had been made subsequent correspondence did not halt the running of the limitations period. Further, it was conceded in the majority opinion that once there has been a disallowance, the statute of limitations continues to run:

"The District Judge interpreted the letters as clearly keeping the door open for further negotiations and not as showing a disallowance which was either reopened or later waived, which would not be permissible to stop the running of the statute under the Act." 495 F.2d at 332.

However, the majority held that the action of the trial court in characterizing the February 19, 1968 letter as a qualified disallowance was reasonable. Unlike the instant suit, there were in the Morrell case subsequent to the initial letter disallowing the claim an admission of partial carrier liability and offers of settlement.

The dissenting opinion of Chief Judge Swygert points out quite clearly the mischief that could result if characterizations as to finality of letters of

disallowance are permitted. Obviously, a carrier by entering into negotiations subsequent to a written disallowance, conceding some liability and making a settlement offer could discriminate on behalf of favored shippers by refusing to conduct such negotiations with others. This is completely contrary to the purpose of the Interstate Commerce Act which was to remove the possibility of any type of discriminatory and non-uniform treatment among carriers and their customers. The Morrell case, if not restricted to the particular facts of the case, could open a very wide door through which attacks on letters of disallowance accepted as such for years by all concerned could be conducted creating uncertainty where none presently exists, until in each instance of challenge, as in the instant suit, there is a resolution by the courts.

Another case relied upon by plaintiff-appellant is Cordingley v. Allied Van Lines, Inc., 413 F. Supp. 1398 (D. Mont. 1976). There, in response to plaintiff's claim, the defendant sent a letter stating that it could not accept any liability. There was a further exchange of correspondence. Suit was commenced more than two years and one day subsequent to the date of defendant's letter disaffirming liability.

The Court cited the Burns, Holford and Kirkpatrick

cases previously discussed in this brief and another case, stated that it was satisfied the cases represented the majority view and would result in a rule that plaintiff's action was barred and then declined to follow these authorities. The Court, at p. 1401 of the opinion, went on to enunciate a new rule "that the statute begins to run on that date when the carrier can be said, in light of the totality of its conduct, to have finally disallowed the claim." Applying this rule, the Court found that plaintiff's claim was not barred.

It is interesting to note that the Court in a footnote to its opinion (n. 4, p. 1401) criticized the rationale but not the result of the Morrell decision just discussed, remarking that the characterization of the letter of disallowance in that case as a qualified disallowance was arbitrary. However, the rule contended for by the Court in Cordingley would lead to the same uncertainty as the Morrell rationale, as set forth in the majority opinion.

Both the Cordingley and Morrell cases fail to make the distinction that even though a claim has been disallowed and the statute of limitations has commenced to run, there is a period of two years and one day before the necessity of suit for correspondence, further negotiations,

changes in mind by the carrier and claimant, offers and counter-demands and possible settlement of the claim. In both cases these activities were engaged in just as in most of the other cases cited in this brief, and in most instances where claims are not settled in the beginning. Under the theories of both cases the meaning of a letter disallowing a claim would be determined not by the plain meaning of the letter itself but by an interpretation based upon subsequent events.

The most recent case in point is Polaroid Corp. v. Hermann Forwarding Co., 541 F.2d 1007 (3rd Cir. 1976), decided September 1, 1976. This case involves two claims by the plaintiff, partial offers of settlement by the defendant, and exchanges of correspondence. An extended review of the relevant authorities is contained in the opinion. In a situation where the partial disallowances were not as explicit and unambiguous as in the instant case, the majority of the Court affirmed the action of the Court below in granting summary judgment for the defendant. At p. 1011 of its opinion, the Court stated the applicable law to be as follows:

"Under 49 U.S.C. § 20(11) and the uniform bill of lading, a claimant must file suit within two years and one day from the date of written notice of disallowance of its claim in whole or in

part. Where a claim has been disallowed in part and suit has not been filed within the prescribed period, the entire claim, not simply the disallowed portion, is barred. 49 U.S.C. § 20(11); see H. Rouw Co. v. Texas & N.O.R.R., 260 S.W.2d 130, 131 (Tex.Civ.App.1953); Burns v. Chicago, M. St. P. & Pac. R.R., 192 F.2d 472, 477 (8th Cir. 1951). This is the key to the instant case. In our view, prior to two years and one day from when this suit was commenced, Transport had informed Polaroid, with notice sufficient under section 20(11), that its claims for dealer invoice price had been disallowed and that Transport would only accept the portion of the claims that represented manufactured cost."

CONCLUSION

For the reasons and authorities above set forth the judgment of the District Court should be affirmed.

Respectfully submitted,

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